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IN THE
COURT OF APPEALS OF INDIANA

DANIEL F. REISSMANN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 23A01-0605-CR-195
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FOUNTAIN CIRCUIT COURT
The Honorable Susan Orr Henderson, Judge
Cause No. 23C01-0510-FB-584

February 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Daniel F. Reissmann[1] appeals from his convictions for Residential Entry, a Class D felony, Theft, as a Class D felony, and being an Habitual Offender. He raises three issues on appeal, which we consolidate and restate as whether the trial court abused its discretion in sentencing Reissmann.

We affirm.

FACTS AND PROCEDURAL HISTORY

On October 14, 2005, Reissmann drank more than twenty-four beers and some liquor before driving to the house of his friend, Jeff Gossett, where Reissmann passed out while still in his car. Dawn Collins, an acquaintance of Gossett's who was at Gossett's home when Reissmann arrived, moved Reissmann to the passenger seat of Reissmann's car. Collins then drove Reissmann's car to the home of sixty-seven year-old Percy Stull in Attica.

Collins had previously visited Stull's home with a mutual friend of hers and Stull's, and upon arriving that night she told Stull that she was in trouble. Stull then invited Collins into his home to talk, but as he did so Reissmann entered Stull's home, yelled at Stull, and struck Stull on his left shoulder. Stull had recently had surgery on that shoulder, and the blow knocked him back into a chair. Reissmann then demanded Stull's jewelry, prescription pain medication, and money, all of which Stull provided.

After Reissmann and Collins left Stull's home, Stull called the police. Officer Terry Holt of the Kingman Police Department pulled over Reissmann's vehicle at 9:15

[1] The briefs and record reflect a variety of spellings for the Defendant's last name. However, we have followed the spelling employed by his appellate counsel.

that evening. As Officer Holt was placing handcuffs on Reissmann, several rings belonging to Stull fell to the ground. The State subsequently charged Reissmann with a number of counts, and a jury found Reissmann guilty of residential entry, a Class D felony, and theft, as a Class D felony. The jury acquitted Reissmann on all other charges, most notably the charge of robbery. Following his convictions, Reissmann pleaded guilty to being an habitual offender.

The trial court held a sentencing hearing on April 18, 2006. At that hearing, Reissmann raised no proposed mitigators in his favor, and the trial court found none. Regarding aggravators, the trial court stated the following:

> The Court has reviewed [the] pre-sentence report and has also considered those factors made mandatory by statute, specifically the risk that you will commit another crime is highly likely based on your history, the nature and the circumstances of the crime that was committed, the victim in this case was an elderly gentleman, the crime occurred in the confines of his own home, he was placed in a state of fear and continues to be fearful. The Court also considers your prior record, character and condition. You have a history of criminal activity going back to the time that you were a juvenile and in fact were on parole at the time this incident . . . did occur, and the Court also considered the victim impact statement made by the victim. The Court finds you have some aggravating circumstances, specifically, your prior felony convictions and the fact that you were on parole at the time the incident occurred. The Court finds no mitigating factors . . . .

Sentencing Transcript at 5-6. The trial court then sentenced Reissmann to concurrent three-year sentences on each of his convictions, plus an additional four and one-half years for his habitual offender status. This appeal ensued.

DISCUSSION AND DECISION

Reissmann argues that the trial court improperly identified and weighed aggravators and mitigators when it imposed enhanced sentences for residential entry and

theft.[2] We note initially that the standard of reviewing a sentence imposed under the advisory sentencing scheme, when the trial court has identified aggravating and mitigating factors, is far from clear. As this court recently noted:

> [The] after-effects [of Blakely v. Washington, 542 U.S. 296 (2004),] are still felt because the new [advisory sentencing] statutes raise a new set of questions as to the respective roles of trial and appellate courts in sentencing, the necessity of a trial court continuing to issue sentencing statements, and appellate review of a trial court's finding of aggravators and mitigators under a scheme where the trial court does not have to find aggravators or mitigators to impose any sentence within the statutory range for an offense, including the maximum sentence. The continued validity or relevance of well-established case law developed under the old "presumptive" sentencing scheme is unclear.
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> We attempted to address these questions in Anglemyer v. State, 845 N.E.2d 1087 (Ind. Ct. App. 2006), trans. granted. We observed that under the current version of Indiana Code Section 35-38-1-7.1(d), trial courts may impose any sentence that is statutorily and constitutionally permissible "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." [Anglemyer, 845 N.E.2d] at 1090. We also noted, however, that Indiana Code Section 35-38-1-3(3) still requires "a statement of the court's reasons for selecting the sentence that it imposes" if a trial court finds aggravating or mitigating circumstances. Id. In attempting to reconcile this language, we concluded that any possible error in a trial court's sentencing statement under the new "advisory" sentencing scheme necessarily would be harmless. Id. at 1091. Therefore, we declined to review Anglemyer's challenges to the correctness of the trial court's sentencing statement. Id. Nevertheless, we stated, "oftentimes a detailed sentencing statement provides us with a great deal of insight regarding the nature of the offense and the character of the offender from the trial court judge who crafted a particular sentence" and encouraged trial courts to continue issuing detailed sentencing statements to aid in our review of sentences under Indiana Appellate Rule 7(B). Id.
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> Our attempt in Anglemyer to analyze how appellate review of sentences imposed under the "advisory" scheme should proceed was met

[2] Because the crimes occurred after the effective date of the 2005 amendments to the sentencing statutes, the advisory sentencing scheme applies. See, e.g., Turner v. State, 669 N.E.2d 1024, 1027 (Ind. Ct. App. 1996). Indiana Code Section 35-50-2-7 requires a Class D felony conviction to result in imprisonment between six months and three years, with the advisory sentence being one and one-half years.

> with a swift grant of transfer by our supreme court. Until that court issues an opinion in Anglemyer, we will assume that it is necessary to assess the accuracy of a trial court's sentencing statement if, as here, the trial court issued one, according to the standards developed under the "presumptive" sentencing system, while keeping in mind that the trial court had "discretion" to impose any sentence within the statutory range for [the felony level of each conviction] "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." See Ind. Code § 35-38-1-7.1(d); see also Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006) ("a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances.")[, trans. denied]. We will assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate. In other words, even if it would not have been possible for the trial court to have abused its discretion in sentencing [a defendant] because of any purported error in the sentencing statement, it is clear we still may exercise our authority under Article 7, Section 6 of the Indiana Constitution and Indiana Appellate Rule 7(B) to revise a sentence we conclude is inappropriate in light of the nature of the offense and the character of the offender. See Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006); see also Buchanan v. State, 767 N.E.2d 967, 972 (Ind. 2002) (holding that Indiana Constitution permits independent appellate review and revision of a sentence even if trial court "acted within its lawful discretion in determining a sentence").
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> In reviewing a sentencing statement, "we are not limited to the written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings." Corbett v. State, 764 N.E.2d 622, 631 (Ind. 2002).

Gibson v. State, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006) (emphasis added). Lacking further guidance to date from our supreme court on the standard of review to be applied, we apply the standard described above in Gibson.

Here, because the trial court stated its reasons for enhancing Reissmann's sentence, we will review those reasons under the abuse of discretion standard. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the trial court has misinterpreted the law. Id.

The court may increase a sentence or impose consecutive sentences if the court finds aggravating factors. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001); Ind. Code § 35-38-1-7.1(b).

Reissmann challenges his sentence on three grounds.[3] First, Reissmann maintains that the trial court abused its discretion in considering an element of the residential entry offense when it stated that the crime occurred in the victim's home. Second, he contends the trial court abused its discretion when it considered the victim's fear, an element of the charge of robbery for which Reissmann was acquitted. And, third, he argues that the trial court abused its discretion in not considering Reissmann's guilty plea on the habitual offender charge as a mitigator.

Regarding Reissmann's first two arguments, Reissmann misreads the transcript and the trial court's sentencing order. While the court may have "considered" the place of the crime and the victim's fear, sentencing transcript at 5, the court clearly stated that it only found two aggravators. Specifically, at the sentencing hearing, the court stated: "The Court finds you have some aggravating circumstances, specifically, your prior felony convictions and the fact that you were on parole at the time the incident occurred." Id. at 6. And in the Sentencing Order, the trial court reiterated that position: "The Court finds the following aggravating factors: 1. Defendant's prior felony convictions and the fact that he was on parole at the time of the instant offenses." Appellant's App. at 72.

[3] To the extent that Reissmann baldly asserts that "the maximum sentence is inappropriate," Appellant's Brief at 15, and cites to Indiana Appellate Rule 7(B), that argument is not supported by cogent reasoning and is therefore waived. See Ind. Appellate Rule 46(A)(8)(a). Indeed, Reissmann's arguments on appeal are entirely couched in the context of the trial court's improper use of aggravators and mitigators, with no substantive discussion of Rule 7(B). But, as stated by our supreme court, "[t]hese are two separate inquiries reviewed under different standards." Noojin v. State, 730 N.E.2d 672, 678 (Ind. 2000). Hence, we do not consider Rule 7(B).

But Reissmann challenges neither of those aggravators. Hence, we cannot say that the trial court abused its discretion in finding either of those aggravators.

Regarding Reissmann's third argument, that the trial court failed to consider his guilty plea on the habitual offender charge as a mitigator, that argument has been waived. As noted above, Reissmann did not advance any possible mitigating circumstances at the sentencing hearing. "[I]f the defendant fails to advance a mitigating circumstance at sentencing, this court will presume that the factor is not significant, and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal." Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) (citing Simms v. State, 791 N.E.2d 225, 233 (Ind. Ct. App. 2003)), trans. denied. Thus, that issue is waived. See id.

Affirmed.

MAY, J., and MATHIAS, J., concur.